Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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MAR 27 2002

FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

COMMENTS OF ENTERCOM COMMUNICATIONS CORP.

Entercom Communications Corp. ("*Entercom*") controls the FCC licenses for 97 radio broadcast stations in 18 markets. Entercom would be affected by any change in the Commission's local radio multiple ownership rules and license-transfer processing procedures. Therefore, Entercom hereby comments on certain of the issues raised in the Commission's Notice of Proposed Rulemaking[1] in the above-captioned docket.

One of the central questions raised by the Commission in the NPRM is whether the Commission, consistent with its statutory mandate, may consider the state of competition in the local market for radio advertising when acting on applications for new radio broadcast stations or applications to transfer radio broadcast licenses.[2] The touchstone for this question, as

1 *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, FCC 01-329 (rel. November 9, 2001) ("*NPRM*"). Entercom also filed comments in respect of the Commission's Notice of Proposed Rulemaking in MM Docket 00-244, *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000), and hereby incorporates those comments by reference.

2 *See* NPRM at ¶¶ 25-27, 42.

the Commission suggests,[3] must be Section 202(b) of the Telecommunications Act of 1996,[4] which provides Congress' most recent instruction on local radio ownership matters.

Prior to the 1996 Act, the Commission had developed its local radio multiple ownership rule and related policies as an interpretation of the Commission's general mandate under Sections 309(a) and 310(d) of the Communications Act of 1934,[5] which require the Commission to regulate the granting and transfer of radio licenses consistent with the public interest, convenience and necessity.[6] Section 202(b) of the 1996 Act changed the statutory landscape in this area of Commission policy by directing the Commission, in a clear and concise manner, to amend its local radio multiple ownership rule to provide specified, numerical limits on local radio station ownership. The directive of Section 202(b), which left in place the general provisions of Sections 309(a) and 310(d), should be read to provide the final and definitive word on Congress' intent for the Commission's exercise of authority under Sections 309(a) and 310(d) in respect of local radio ownership. That is, a proposed combination of radio stations that meets the numerical limits set forth in Section 202(b) – using the definition of the "radio market" in place at the time of the 1996 Act[7] – complies with Congressional intent and should bear no further Commission scrutiny on issues of local radio multiple ownership under the Communications Act.

Contrary to the clear numerical limits embodied in Section 202(b) of the 1996 Act, there is no clear Congressional mandate for the Commission to consider competition and

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3 NPRM at ¶ 22.

4 Pub. L. No. 104-104, § 202(b), 110 Stat. 110 (the "*1996 Act*").

5 47 U.S.C. §§ 309(a), 310(d).

6 *See* NPRM at ¶ 21.

7 *See* Comments of Entercom Communications Corp. at 4-5, MM Docket No. 00-244 (filed February 26, 2001).

concentration in economic markets, like the radio advertising market, when making determinations under Sections 309(a) and 310(d). Congress could have included such a mandate in the 1996 Act, but did not do so. As the Commission notes,[8] the Senate bill in the proceeding that led to the 1996 Act contained language that would have explicitly permitted the Commission to consider "undue concentration of control" or "harm [to] competition" in license approval and transfer proceedings, but the final version of the 1996 Act did not contain this language. Congress' rejection of the Senate approach, together with Congress' adoption of the plain language of Section 202(b), provides a clear statement that, on matters relating to local radio multiple ownership, the Commission should not consider issues, including concentration in economic markets, beyond the text of Section 202(b) of the 1996 Act.

Moreover, that Congress would narrow the focus for Commission inquiries in local radio ownership matters makes sense. The Commission's review of economic concentration in the radio advertising market is wholly duplicative of matters that are fully within the purview of the Department of Justice and the Federal Trade Commission under federal antitrust laws. Indeed, the Commission itself acknowledges in the NPRM that its current practice is to await the completion of any DoJ review of a radio transaction,[9] and the Commission proposes in the NPRM to rely on DoJ-imposed remedies in most cases as a "sufficient resolution of competition issues raised by the transaction."[10] The Commission should take the next logical step and acknowledge Congress' intention in the 1996 Act that the Commission limit its review of local radio ownership to the numerical caps contained in the text of Section 202(b), and leave the analysis of economic markets to DoJ and FTC. Furthermore,

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[8] NPRM at ¶ 12, n.41.

[9] NPRM at ¶ 67.

[10] NPRM at ¶ 78.

with the proper focus of the Commission's analysis in local radio ownership matters on the numerical caps contained in Section 202(b), the Commission's interim policy on processing radio assignment and transfer of control applications, including the 50/70 transaction screen, should be rescinded.

As described above, the Commission's course of action in interpreting the mandate of Section 202(b) of the 1996 Act on local radio ownership matters should be clear. However, the tenor of the NPRM suggests that the Commission may feel compelled to continue to analyze the state of competition in the radio advertising market in connection with proposed assignments and transfers of control of radio station licenses. While this would not be the correct result, if the Commission does adopt such a course, the Commission should implement two important changes to its current interim policy.

First, the Commission should abstain entirely from a competition analysis if the transaction is subject to the pre-merger filing process under the Hart-Scott-Rodino Act. Even assuming for the sake of argument that smaller radio transactions merit a competition analysis by the Commission because these transactions are not formally brought to the attention of DoJ or FTC, for the Commission to perform a competition analysis in proceedings that are otherwise subject to the HSR filing requirement clearly results in two federal government agencies duplicating efforts, and consuming unnecessary government and private sector resources. If a radio transaction is subject to the HSR filing requirement, the action or inaction of the DoJ or FTC in that process should be the exclusive and final determination on competition matters.

Second, if the Commission implements a transaction screen process, such as the 50/70 transaction screen in the Commission's interim policy, to determine when the Commission will analyze the impact of the proposed transaction on economic competition, then that transaction screen should be a single threshold value for the market participant proposing to acquire stations in the transaction rather than the dual threshold of the current interim policy. Whatever the value of a single-value/single-party threshold for isolating transactions of potential concern, a second threshold does nothing but allow a dominant market player to entrench its position in the market by raising a regulatory barrier to lesser market participants who wish to improve their competitive position by acquisition or joint venture.

Shielding the dominant market participant from more effective competition in this way not only works at cross-purposes with the Commission's stated goal to encourage competition, but also works a fundamental unfairness on the lesser market participants, who are hampered by regulatory policy in their efforts to improve their competitive position and defend the viability of their businesses. This unfairness is especially acute because the dominant market participant that is in place today can use its current market position to further increase its market share and further entrench against competitive challenges. Indeed, the only way to prevent this further entrenchment is for the other competitors in the market to be free to improve their ability to compete.

For example, under the two-tiered threshold of the Commission's interim policy, in a market that has four participants with market shares of 55%, 25%, 15%, and 5% of radio advertising revenue, respectively, a proposed transaction to combine the two least competitive participants in the market – the 15% and 5% players – to better challenge the dominant market participant and fend off further erosion of market share will trigger the second threshold of the Commission's interim "flagging" policy, despite being more than thirty percentage points under the initial threshold. This result discourages the creation of a more effective competitor to the dominant market participant because the flagging policy introduces substantial uncertainty, delay and additional cost for transactions that are likely to be flagged.

Historically, the Commission's flagging policy has resulted in significant processing delays, often delays of a year or more. And in spite of the Commission's recent commitments regarding timely processing of flagged applications,[11] the proposed six-month processing timetable for the Bureau still exceeds the timetable for routine transactions, and, in view of the recent nature of this commitment, there remains uncertainty in the minds of lenders, investors and other parties about the implementation of this commitment. In addition to processing delays, the flagging policy introduces additional uncertainty about the substantive outcome of the proceeding. Finally, the flagging policy also significantly increases the transaction costs for flagged transactions, including higher attorney and economist fees and higher costs attributable to processing delays described above.

All of these impediments imposed by the flagging policy deter parties from entering into transactions that may be flagged, and also deter investors and financial institutions from financing such transactions. And because the second threshold in the transaction screen sweeps in pro-competitive transactions, the dual threshold transaction screen actually inhibits transactions that would serve the goal of more effective competition. Thus, if the Commission must implement a "flagging" or other transaction screen policy, the Commission should do so with a single value/single party threshold that does not inhibit lesser competitors in a market from mounting a more effective competitive challenge to the dominant market participant.

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[11] *See* NPRM at ¶ 87.

The Commission was correct to launch this inquiry into its policies on local radio multiple ownership, and Entercom appreciates the opportunity to provide input because the Commission's current policy will not have the beneficial effects that the Commission desires. Furthermore, as the Commission notes,[12] since the watershed 1996 Act, the Commission has not received the benefit of public input via a rulemaking proceeding on these important issues. In this process, the Commission should find that Section 202(b) of the 1996 Act sets the exclusive bounds of Commission scrutiny on issues of local radio multiple ownership under the Communications Act. However, if the Commission does not so find, then, at the very least, it should implement its review of economic concentration matters in the manner described above.

Respectfully submitted,

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March 27, 2002

12 NPRM at ¶ 22.